



GEORGIA DEPARTMENT OF LAW

40 CAPITOL SQUARE SW
ATLANTA, GA 30334-1300

SAMUEL S. OLENS
ATTORNEY GENERAL

www.law.ga.gov
(404) 656-3300

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WRITER'S DIRECT DIAL
(404) 656-3303
FAX (404) 657-3239

Julius M. Hulsey, Esq.
Hulsey, Oliver & Mahar, LLP
Post Office Box 1457
Gainesville, Georgia 30503

Re: Applicability of affidavit requirement in O.C.G.A. § 13-10-91(b)(1) to
routine operation, repair, and maintenance projects involving public property.

Dear Mr. Hulsey:

This responds to your inquiry regarding whether part of the definition of "public works construction" found in O.C.G.A. § 36-91-2(12) can be grafted on to the definition of "physical performance of services" found in O.C.G.A. § 13-10-90(4). As noted in your correspondence, such an interpretation would exempt routine operation, repair, and maintenance projects involving existing public structures, buildings, and property from the affidavit requirement of O.C.G.A. § 13-10-91(b)(1). Since the General Assembly elected to exclude language from the definition of "physical performance of services" exempting routine operation, repair, and maintenance from its scope, it appears that the definition in O.C.G.A. § 36-91-2(12) cannot be utilized to limit the affidavit requirement in O.C.G.A. § 13-10-91(b)(1).

The specific question that you have raised relates to the requirements of O.C.G.A. § 13-10-91(b)(1)¹ which provides relevantly as follows:

(b) (1) A public employer shall not enter into a contract pursuant to this chapter *for the physical performance of services unless the contractor registers and participates in the federal work authorization program. Before a bid for any such service is considered by a public employer, the bid shall include a signed, notarized affidavit from the contractor attesting to the following:*

¹ Effective July 1, 2011, O.C.G.A. § 13-10-91(b)(1) was slightly modified. 2011 Ga. Laws 794, 797, 817.

(A) The affiant has registered with and is authorized to use the federal work authorization program;

(B) The user identification number and date of authorization for the affiant;

(C) The affiant will continue to use the federal work authorization program throughout the contract period; and

(D) The affiant will contract for the physical performance of services in satisfaction of such contract only with subcontractors who present an affidavit to the contractor with the same information required by subparagraphs (A), (B), and (C) of this paragraph.

An affidavit required by this subsection shall be considered an open public record once a public employer has entered into a contract for physical performance of services; provided, however, that any information protected from public disclosure by federal law or by Article 4 of Chapter 18 of Title 50 shall be redacted. Affidavits shall be maintained by the public employer for five years from the date of receipt.

(Emphasis added.) The General Assembly has specifically defined the phrase “physical performance of services” as:

... the building, altering, repairing, improving, or demolishing of any public structure or building or other public improvements of any kind to public real property within this state, including the construction, reconstruction, or maintenance of all or part of a public road; or any other performance of labor for a public employer under a contract or other bidding process.

O.C.G.A. § 13-10-90(4)² (emphasis added). By its express terms, O.C.G.A.

² Effective July 1, 2011, the definition of “physical performance of services” was slightly modified. 2011 Ga. Laws 794, 796, 817.

§ 13-10-91(b)(1) requires the affidavit for “contract[s] pursuant to this chapter for the physical performance of services.” The caption to Senate Bill 447 which enacted O.C.G.A. § 13-10-90(4) provides relevantly that it is:

[t]o amend Chapter 10 of Title 13 of the Official Code of Georgia Annotated, relating to contracts for public works, so as to provide certain contractual and purchasing preferences for materials and in letting contracts to materialmen, contractors, builders, architects, engineers, and laborers who reside within the state; to provide standards for construction projects; to provide a definition; to clarify certain provisions and requirements relating to public employers’ verification of employee work eligibility;

2010 Ga. Laws 308 (emphasis added). Therefore, the preamble to the legislation enacting the definition of “physical performance of services” indicates that Chapter 10 of Title 13 relates to “contracts for public works.”

Based on the use of the phrase “contracts for public works”³ in the preamble, you have inquired whether the definition of “public works construction” found in O.C.G.A. § 36-91-2(12) limits the scope of the affidavit requirement in O.C.G.A. § 13-10-91(b)(1). “Public works construction” is defined as:

. . . the building, altering, repairing, improving, or demolishing of any public structure or building or other public improvements of any kind to public real property other than those projects covered by Chapter 4 of Title 32. Such term does not include the routine operation, repair, or maintenance of existing structures, buildings, or real property.

³ It is worth noting that the term “public works contracts” is a broad term that encompasses a wide variety of public contracts. There is a general two-part test for a public works contract – that the contract be “public” and that it be for “work” or “works” See 48 A.L.R.4th 1170, 1178 (1986). As a further explanation, the first test for a contract to be “public” is that it “bears a relation to legitimate governmental interests or activities on behalf of the public at large.” *Id.* The second test requires that the contract cover “work” or “works” in the sense that it entails some “physical action” in connection with a “physical subject matter.” *Id.*

O.C.G.A. § 36-91-2(12) (emphasis added). As noted in your correspondence, portions of the definition of “public works construction” are identical to the definition of “physical performance of services.” However, there are some very significant deviations between these two definitions.⁴ Relevantly, “public works construction” specifically excludes “routine operation, repair, or maintenance of existing structures, buildings, or real property” from its definition. This exception is notably absent in the definition of “physical performance of services.”

Clearly, the General Assembly knew how to except “routine operation, repair or maintenance of existing structures, buildings, or real property” from the scope of a statute as it expressly did so in O.C.G.A. § 36-91-2(12). The General Assembly elected to not make this choice related to the affidavit required by O.C.G.A. § 13-10-91(b)(1). It is a fundamental precept of statutory construction that:

All statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it. They are therefore to be construed in connection and in harmony with the existing law, and as a part of a general and uniform system of jurisprudence, and their meaning and effect is to be determined in connection, not only with the common law and the constitution, but also with reference to other statutes and the decisions of the courts.

Allison v. Domain, 158 Ga. App. 542, 544 (1981) (quoting *Botts v. Southeastern Pipe-Line Co.*, 190 Ga. 689, 700 (1940)) (emphasis added). The fact that the definition of “physical performance of services” tracks, in part, the definition of “public works construction” established the correctness of the presumption that the General Assembly was aware of O.C.G.A. § 36-91-2(12) when it enacted O.C.G.A. § 13-10-90(4). See *Allison*, 158 Ga. App. at 545 (holding that the fact the General Assembly used different language regarding different groups of covered employees, “is clearly indicative of the intention that the language is to have a different meaning as applied to” the different groups). As the definition of “physical performance of services” does not contain the

⁴ For example, “physical performance of services” expressly provides that it applies to “the construction, reconstruction, or maintenance of all or part of a public road” whereas the definition of “public works construction” expressly provides that it does not apply to “those projects covered by Chapter 4 of Title 32” which address construction of public roads.

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exception for routine operation, repairs, and maintenance that is found in the definition of "public works construction," it appears that the exception is not a valid basis for non-compliance with the provisions of O.C.G.A. § 13-10-91(b)(1).

The definition of "physical performance of services" does not except "routine operation, repairs, and maintenance" from its scope and, therefore, whether the work required under the terms of a contract can be characterized as "routine" appears to be irrelevant. In order to determine if the affidavit requirement of O.C.G.A. § 13-10-91(b)(1) applies to a given contract, the question to be resolved is whether the work involves "the building, altering, repairing, improving, or demolishing of any public structure or building or other public improvements of any kind to public real property." It appears that at least some items which can be classified as "routine operations, repairs, and maintenance" would fall under the definition of "physical performance of services" and, thus, mandate that the contractor provide the required affidavit.

I hope that this response is helpful. Please keep in mind that this is not an official or unofficial opinion of the Attorney General.

If you have any questions, please contact me.

Sincerely,



OSCAR B. FEARS, III
Senior Assistant Attorney General